81-2413

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

YOULESS "JAMES" VALENTINE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A. Did the District Court err in allowing evidence of unrelated crimes, wrongs or bad acts committed by the defendant but not the subject of the Indictment?

B. Did the District Court err in restricting cross examination of the two key prosecution witnesses?

PARTIES TO THIS PROCEEDING

YOULESS JAMES VALENTINE was indicted, tried, and convicted with Gary Rae Buchanan. Each filed separate appeals. Those appeals were consolidated for review before the Ninth Circuit Court of Appeals. The case of United States v. Youless James Valentine, is C.A. No. 81-1187. The case of United States of America v. Gary Rae Buchanan, is C.A. No. 81-1186.

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OPINION BELOW

On April 30, 1982, the Court of Appeals for the Ninth Circuit filed and entered its Opinion affirming the conviction of Petitioner VALENTINE. A copy of the unpublished opinion, or Memorandum, of the Court of Appeals for the Ninth Circuit appears as Appendix A attached hereto. No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

On April 30, 1982, the Court of Appeals for the Ninth Circuit entered judgment affirming the conviction of Petitioner. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court, and invoked by Petitioner, pursuant to 62 Stat. 928, Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

> Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously asertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FEDERAL STATUTES INVOLVED

Rule 404(b) of the Federal Rules of Evidence states:

> (b) other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

On January 30, 1981 a five count felony Indictment was filed against YOULESS JAMES VALENTINE charging him with one count of criminal conspiracy, a violation of Title 18 U.S.C. Section 371. The Indictment also charged four counts of aiding and abetting the entry of false statements in the records of a banking institution, a violation of Title 18 U.S.C. Section 1005 and Section 2(b).

Defendant's jury trial was held in the United States District Court for the Central District of California, the Honorable Manuel L. Real, Judge presiding.

Jury trial began on Tuesday,

March 3, 1981. The jury found defendant guilty as charged in all five counts of the Indictment on Thursday, March 5, 1981 (RT 628-629).[1]

On Tuesday, March 24, 1981 the defendant was sentenced to the custody of the Attorney General for a period of five years on Counts one, two, three, four and five. As to Counts four and five, the Court imposed a sentence of a jail type institution for the first six months of the five year term, the balance of the term was suspended and the defendant was placed on probation for a period of five years.

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[1] "R.T." refers to "Reporter's Transcript". "ECR" refers Transcript". "ECR" refers to "Excerpt of Clerk's Record".

Balance of the term was suspended and the defendant was placed on probation for a period of five years. The sentences as to Counts one, two, and three were to be served concurrent to each other. The sentences as to Counts four and five were to run consecutive to the other Counts (RT 643-644).

Defendant VALENTINE timely filed his Notice of Appeal (CR 27).

On April 30, 1982, the Court of Appeals for the Ninth Circuit filed a Memorandum, unpublished opinion, affirming the defendant's conviction (see Appendix A).

STATEMENT OF THE FACTS

Lillian Marlene Crim was a key government witness. Crim had known VALENTINE since 1977 and in September of 1979 when she was working at the Mechanics National Bank she was approached by VALENTINE with a request to extract certain records from the bank of her employment. Crim removed the signature card for the checking account for one Patricia Sutton and gave it to VALENTINE as well as the signature card for Sutton's savings account. She also supplied VALENTINE with a balance on the accounts. After VALENTINE had gleaned the pertinent information from the card it was replaced in the files of the bank by Crim (RT 69-73). Sometime

thereafter, Patricia Sutton complained to the bank about unauthorized withdrawals from her account.

Crim was again contacted by VALENTINE at a later date requesting additional account information from depositors at the Mechanics Bank. When she refused, VALENTINE threatened with exposing her in the improper sum withdrawals. Crim acquiesced and supplied account card information on the account of Ada Bench. She also supplied VALENTINE with the signature card which was returned by VALENTINE several days later to Crim with instructions that she replace it in the bank files. (RT 78-83).

Thereafter, on several occasions, while Crim was at work, she saw a woman

she knew as Diana Leach enter the bank dressed as a security guard. Crim knew Leach through Valentine. Crim knew that Leach was making unauthorized withdrawals. Sometime after these two occasions, VALENTINE requested that Crim pull the Ada Bench card and return it to him. VALENTINE told Crim to pull the account card of Ada Bench and tear it up. (RT 83-88).

Crim received no money from VALENTINE for supplying him with the bank information or account cards of Sutton or Bench.

Crim entered into a plea agreement with the government, whereby the government agreed in exchange for her testimony to dismiss five felony counts against her and allow her to

plead to a first superseding Information charging a misdemeanor. A further part of the agreement was that the government would recommend probation. (RT 91-98).

Crim related how she had lied to the FBI in the fall of 1980 with respect to her involvement in assisting Valentine in defrauding the bank.

On cross examination, Crim revealed that fact that she would have to plead guilty only to a misdemeanor had contributed to her decision to testify for the government. Crim further stated that she decided to become an informer for the FBI and ultimately to testify against the defendants only after discovering that she would receive a misdemeanor. [RT 114-119]. When counsel attempted to

inquire as to whether or not prior to the time that the FBI interviewed her, she had ever contacted the law enforcement personnel to divulge her involvement the Court sustained a government objection. When counsel asked Crim whether or not she ever went to the FBI voluntarily, the Court again sustained an objection. (RT 21). The Court refused to allow counsel to go into the details of Crim's meeting with FBI agents Johnson and Gates. When counsel asked Crim whether or not she was read her rights by the FBI, the Court again sustained an objection. (RT 122-123).

Counsel then attempted to elicit whether or not any promises were made by

the FBI in connection with her conversations with them, and the Court again sustained a government objection. When counsel attempted to inquire as to whether or not Crim was ever threatened by the FBI, another government objection was sustained.

Mr. Vodnoy: Were there any threats made the FBI?

Mr. Fees: Objection.

The Court: The objection is sustained.

Mr. Vodnoy: Your Honor, I am at a loss.

The Court: It's irrelevant, Mr. Vodnoy, irrelevant.

Mr. Vodnoy: That threats were made or promises?

The Court: Just a moment, counsel; it's irrelevant.

Mr. Vodnoy: May there be a motion to strike

this witness' testimony for lack of confrontation on key issues?

The Court: There is no lack of confrontation. You haven't asked her about any inconsistent statement. That is what is relevant.

(RT 123-124)

Crim then again admitted to lying to the FBI on several occasions about the extent of her involvement and the reasons that she became involved. (RT 124-127).

On redirect examination by the government, and over objection by counsel, Crim testified that she had cashed checks for VALENTINE which were unrelated to the instant offense, over approximately a six year period. Crim

stated that she also took a trip to San Francisco with both defendants and several women and engaged in a weekend of forging and check cashing. (RT 173-178) When both defense counsel objected to this line of inquiry as being irrelevant, the Court overruled the objection.

Mr. Lichtman: Your Honor, I would object to this line of questioning regarding other co-conspiracies not charged in the Indictment pursuant to a recent case.

The Court: The objection is overruled, counsel. You all opened this up with reference to talking to this lady about her prior convictions. I think she is entitled to explain that.

Mr. Vodnoy: You Honor, there is no prior conviction that we asked about.

The Court: Prior conduct then in forgery. You asked about it ten times, as a matter of fact, Mr. Vodnoy.

Mr. Vodnoy: In response to the direct, Your Honor.

The Court: That doesn't change it. (RT 179)

Following this colloquy, Crim was allowed to testify in detail as to her prior criminal associations with VALENTINE and specifically the weekend trip to San Francisco. (RT 179-185).

Debra Ann Faulkner was the government's other key witness. Faulkner had known VALENTINE since 1973

and had also known co-defendant Buchanan since that date; she was also an associate and friend of Diana Leach who Crim had previously testified made the unlawful withdrawals from the Bench account. Faulkner testified that in November, 1979 she made two withdrawals from the Mechanics National Bank in Cudahay, California from the account of Patricia Sutton. To obtain the money, she dyed her hair so that her physical description would match that of Sutton. She stated that she dyed her hair and committed the forgery at the request of Mr. VALENTINE. (RT 237-242).

Faulkner reviewed the photocopies of the signature cards, memorized the information and practiced the signature of Patricia Sutton prior to entering the

bank and making the withdrawal. The witness then testified to the details of entering the bank, filling out the withdrawal slip, exiting the bank and returning to Buchanan's car where she turned over $9,500.00 to Buchanan. They then drove to Crim's house to meet VALENTINE. (RT 248-254).

Faulkner's only source of income during 1979 was forgery and prostitution. Faulkner had been convicted twice before for forgery and at the time of trial had an outstanding forgery case in Beverly Hills as well as a probation violation pending in San Diego. She was a fugitive from the pending charges in Beverly Hills (RT 261-263).

Faulkner stated she supplied the

Information with respect to VALENTINE and Buchanan in the hopes of obtaining favorable treatment from the FBI. She further stated that she received $200.00 from the FBI for her cooperation on two separate occasions. The witness admitted that on several occasions, even while she was cooperating with the FBI, she lied to them about her involvement in cases unrelated to the instant charge. As a result of her cooperation, the witness received immunity in the instant case and was allowed to plead guilty to one felony count in an unrelated case. When asked why she cooperated with the FBI and was willing to testify, she stated her motive was "revenge" against defendants VALENTINE and Buchanan (RT 263-267).

On cross-examination Paulkner stated that she committed forgeries on a day to day basis. She testified that she committed forgeries for VALENTINE and Buchanan every month for the last seven years and never received so much as a penny for her efforts (RT 270-273). The witness stated that during the period of 1973 to 1978 she never informed anyone in any official capacity about her involvement with VALENTINE and Buchanan. When counsel attempted to inquire as to whether or not she ever attempted to find employment or was ever employed in any legitimate enterprise from 1973 to 1979, the Court sustained government counsel's objection. After Paulkner admitting having sexual relations with VALENTINE, counsel was

further precluded from making any inquiries as to when those sexual relations occurred (RT 276-280).

Faulkner testified that she met Diana Leach in June or July of 1979 and commenced living with her in June of 1979 until October of 1979. When counsel attempted to inquire as to why she discontinued living with Leach, the Court precluded the inquiry (RT 231).

Faulkner testified that she first informed the FBI of her involvement in the Mechanics Bank scheme in September of 1980. She stated that Diana Leach introduced her to the FBI. She interviewed with the FBI at Leach's attorney's house. Faulkner testified that Leach told her that she could get a new start and have everything cleared up

if she were willing to talk to the FBI about VALENTINE and Buchanan. Leach told Faulkner that she could get out of her cases and that the FBI would be helpful if she were willing to testify against VALENTINE and Buchanan (RT 303-308). After the initial interview with the FBI in September of 2980, Faulkner began meeting with the FBI approximately every two weeks. It was during this time that she received the two $200.00 payments from the FBI for her assistance. Faulkner testified that she was involved in a forgery scheme with two other individuals known as "Roberts" and "Darks" during the same time frame that she was cooperating with the FBI, but failed to inform the FBI of that fact (RT 312-314). However, when

counsel attempted to inquire as to the specifics of each conversation with the FBI the questions were objected to and sustained by the Court (RT 314-315).

On redirect examination, Faulkner testified that on several occasions VALENTINE and Buchanan "set her up" because she wanted to return to her home in Oklahoma. On re-cross examination, counsel for VALENTINE attempted to examine the witness as to her home in Oklahoma, her home town in Oklahoma, the number of times she had been to Oklahoma and the last time that she was in Oklahoma. The Court refused to allow these inquiries. The Court further refused to allow counsel to elicit the fact that Faulkner was a fugitive from her case in Beverly Hills at the time of the instant offense (R.T. 356-361).

REASON FOR GRANTING THE WRIT

ARGUMENT

A.

THE COURT ERRED IN RESTRICTING CROSS-EXAMINATION OF THE TWO KEY PROSECUTION WITNESSES.

Marlena Crim and Debra Faulkner were the two key government witnesses whose testimony tended to establish VALENTINE's participation in the charged offenses. Crim described herself as the bank insider who supplied information to the defendants and saw to it that the falsified withdrawals were completed without incident. Faulkner acted as the impersonator. She utilized Crim's inside information to effect the

withdrawal of the money by passing as the bank customer whose records had been falsified by Crim. Both testified they accomplished their respective roles only at the behest and through the coercive efforts of the defendants.

Marlena Crim, as a result of her willingness to testify for the government, had the five count felony indictment against her dismissed and pled guilty to a one count superseding misdemeanor Information with the understanding that the government would recommend a probationary term as a sentence. Faulkner received immunity from prosecution in exchange for her testimony. Faulkner was the informant who initially went to the FBI and relayed information concerning

VALENTINE's involvement in the Mechanics National Bank fraud.

During the cross-examination of Crim and Faulkner by both defense counsel, the Court repeatedly sustained the government's objections. The Court precluded legitimate lines of inquiry without stating its reasons for sustaining the objection and denying counsel the right to make offers of proof. These restrictions denied defendant VALENTINE his Sixth Amendment right to confront witnesses against him.

The trial transcript reveals that on numerous ocassions the Court precluded counsel from asking questions aimed at eliciting testimony that went to the bias, motive, credibility and ability of the witnesses to recollect

-acts and circumstances surrounding the Indictment. Although the record is replete with sustained objections to legitimate questions, the most important areas of inquiry precluded by the Court merit brief discussion here.

When counsel attempted to cross examine Crim as to how she first met the FBI, the Court refused to allow any inquiry into the area. (R.T. 122). When counsel attempted to inquire of Crim whether or not the FBI had made any promises or posed any threats to the witness, the Court sustained government objections. The Court was of the belief that inquiry into promises or threats by the FBI were not relevant if they did not amount to an inconsistent statement. (R.T. 123-124). Later, while cross

examining Crim, counsel attempted to elicit testimony as to who had selected the Sutton account as a good account to defraud. Again, the government's objections were repeatedly sustained (R.T. 130-131).

When queried by counsel as to the different people that Crim had lied to, the Court sustained a government objection. (R.T. 141) After redirect examination by the government, counsel for VALENTINE attempted to inquire into the specifics of the other crimes activity alleged between Crim and Faulkner. In so doing, counsel questioned how Crim could have cashed checks for VALENTINE when her testimony revealed that she had never presented identification to the bank. When

Counsel attempted to inquire into this area, the Court again sustained government objections. Counsel was further precluded from asking the witness whether she had ever informed the FBI of her other check cashing schemes with VALENTINE (R.T. 197).

VALENTINE was likewise restricted on his cross examination of Paulkner. After Paulkner testified that she made her living by prostitution, counsel was not allowed to inquire into the specifics of her prostitution activities. (R.T. 271). VALENTINE was precluded from inquiring whether Paulkner had ever sought legitimate employment or if she had ever been legitimately employed from the period of 1973 to 1979 (R.T. 276, 277).

Faulkner testified on direct and cross-examination that her crime partner was Diana Leach. The Court however refused to allow counsel to inquire into the nature of the witness' relationship with Leach. VALENTINE attempted to inquire into Faulkner's attitude about not being indicted in this case and the Court again sustained the government's objection (R.T. 281, 297).

After the witness testified that she had met with the FBI on numerous occasions, VALENTINE attempted to inquire as to what each conversation with the FBI involved and what the witness' recollection was as to each conversation. The Court sustained repeated objections to this line of inquiry. (R.T. 315).

Lastly, on redirect examination, VALENTINE inquired as to why the witness felt that VALENTINE and Buchanan had "set her up". The witness stated that it was because she desired to return to her home in Oklahoma. On recross examination VALENTINE attempted to inquire as to why she needed VALENTINE's assistance to return to her home. Counsel further attempted to inquire as to where her home in Oklahoma was, how often she been there in the recent past and why it was was that she could not find sufficient resources on her own to return to Oklahoma if she so desired. The Court again refused to allowed these questions to be asked and sustained the objections by the government (R.T. 359-362).

In Alfred v. United States 282 U.S. 687, 690 (1931) this Court stated:

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the Court what facts a reasonable cross-examination might develop... to say what prejudice can be established only by showing the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a sustantial right and withdraw one of the safeguards essential to a fair trial. 282 U.S. at 690.

Accord, United States v. Alvarez-Lopez, 559 F.2d 1155, 1159 (9th Cir. 1977)

In Smith v. Illinois, 390 U.S. 129, 131, (1967) this Court stated:

> A denial of cross examination without waiver... would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it. 390 U.S. at 131.

Thus the harmless error doctrine has been held inapplicable to the denial of the right of cross-examination. United States v. Uramoto, 638 F.2d at 884 (9th Cir. 1980). While circuit courts have held that the trial Court may restrict cross-examination for the purpose of preventing time wasting exploration into collateral matters, Shipman v. Mercer 628 F2d 528-530 (9th Cir. 1980); Skinner v. Cardwell 564 F2d 1381, 1388-1389 (9th Cir. 1977) cert denied, 435 U.S. 1009 (1978), the Ninth Circuit has repeatedly recognized that wide latitude must be afforded to

defense counsel in their cross-examination of key government witnesses. United States v. Bleckner, 601 F2d 382, 385 (9th Cir. 1979); United States v. Standfield, 521 F.2d 1122, 1128 (9th Cir. 1975); United States v. Uramoto, supra.

Exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of confrontation as set forth in the Sixth Amendment. Green v. McElroy, 360 U.S. 474, 496 (1959). The defendant has a right to wide latitude to develop a record regarding the bias of an individual witness. Davis v. Alaska, 415 U.S. 308 (1974).

This Circuit and others have recognized that an informant's other violations of the law and instances of cooperation bear directly on the credibility of the witness. United States v. Elja, 568 F.2d 493 (6th Cir. 1977); United States v. Salsedo, 607 F.2d 318 (9th Cir. 1979); United States v. Uramoto, supra.

The most critical denial of confrontation in this case, although just one of many, and the one that went directly to the heart of the witnesses' reasons for testifying, is seen in the Court's refusal to allow inquiry into threats and promises made by the FBI to the witnesses:

Mr. Vodnoy: And were there any promises made by anybody at the FBI

in regard to that conversation?

Mr. Feess: Objection.

The Court: The objection is sustained.

Mr. Vodnoy: Were any threats made by the FBI?

Mr. Feess: Objection.

The Court: The objection is sustained.

It was obvious what counsel for defendant VALENTINE was attempting to do by the above inquiries. Witness Crim was testifying pursuant to a plea agreement. She had cooperated with the FBI for a substantial period of time. Yet previously, the Court sustained objections disallowing VALENTINE from making inquiries into the surrounding circumstances of those conversations. Crucial to VALENTINE's cross examination

as a full and complete fleshing out of the relationship between Crim and the Government. The fact that a written plea agreement had been entered into was of no moment. Any promises, threats or persuasion by the FBI upon the witness to testify was crucial in establishing her underlying bias and motive to testify. It also went directly to her motive to falsify in a case where her testimony and the testimony of co-accomplice Debra Faulkner was the sole supporting testimony for the defendant's conviction.

In light of the importance of the testimony of this witness, coupled with the fact that she had struck a deal with the Government in consideration for her testimony, made this inquiry crucial.

The fact that the witness may have been threatened at any time by the FBI, or promised other considerations than those contained in the plea agreement, would weigh heavily in the jury's consideration of her credibility as a witness. And without Crim and her accomplice, Faulkner, the government had no case.

The denial of the right to confront this witness in this crucial area and others which are set forth in detail in Appellant's opening brief, was aggravated by the Court's misconception of the relevancy of the inquiry. After the above cited objections were sustained by the Court, the following colloquy occurred between counsel and the Court.

Mr. VODNOY: Your honor, I am at a loss.

COURT: It's irrelevant; Mr. Vodnoy, irrelevant.

Mr. VODNOY: That threats were made or promises?

COURT: Just a moment, counsel; it's irrelevant.

Mr. VODNOY: May there be a motion to stike this witnesses' testimony for lack of confrontation on key issues?

COURT: There is no lack of confrontation. You haven't asked her about any inconsistent statement. That is what is relevant.

Thus, while counsel for defendant VALENTINE was attempting to ascertain whether or not this witness had been

threatened by the FBI to entice her to testify, or promised anything additional to that contained in the plea agreement, the Court was of the mind that such testimony would only be relevant if the testimony was somehow inconsistent with other statements or testimony she had given. Such an analysis flies in the face of the common sense application of the relevancy requirements of testimony and the right to confront witnesses.

The above examples of testimony precluded by the Court are by no means the sum and substance of the Court's intrusion into the cross-examination process. The numerous other inquiries made by counsel to both Crim and Faulkner were precluded by the Court based on unfounded objections by the

Government. The record is replete with relevant questions being sustained by the Court that went directly to the witnesses' motives to falsify, bias, hostility, and general credibility as a witnesses. Objections were repeatedly sustained regarding Crim's conversations with the FBI. See for example: (RT 197, 121, 122).

While the Government was allowed to elicit threats made by defendant Buchanan against the witness, counsel for defendant Buchanan was disallowed from examining the witness about those threats to establish that in fact no threats had been made (RT 212-214).

Similarly, the Court restricted the cross-examination of prosecution witness Debra Ann Faulkner. While

Faulkner testified that she was reliant upon defendant VALENTINE for her means of support, and was therefore unable to refuse his coercive influence to break the law, counsel for defendant VALENTINE was precluded from going into Faulkner's ability to (1) get a job and find employment; (RT 276); (2) inquire into her employment between the years 1973 to 1979 (RT 276); (3) determine if she could have left the state as was her express desire (RT 360-361).

Thus, while the witness was allowed to indicate that she was basically enslaved to the defendants, defense counsel was unable to inquire into the validity of such a statement.

As noted by this Court in Alfred, supra, without reasonable latitude for

Cross-examination it is difficult to determine what that cross examination would produce. The failure of the Court in this case to allow broad latitude in cross examination is highlighted since the two critical witnesses were (1) uncorroborated except for their testimony and (2) were either granted immunity, or beneficial plea agreements for closing jail time and were admitted accomplices and informers. The Court's failure to allow inquiry into crucial areas is done in the face of the fact that both of these witnesses had substantial history of prior criminal activity, both had admitted lying previously to FBI agents and others, and thus their credibility must be subject to impeachment through the most broad

cross examination. The Court's denial of such cross examination violated the defendant's right to a fair trial and to confront the witnesses against him. Accordingly, this Court should grant the Petition for Writ of Certiorari.

B.

THE COURT ERRED IN ALLOWING EVIDENCE OF UNRELATED CRIMES, WRONGS OR BAD ACTS COMMITTED BY THE DEFENDANT BUT NOT THE SUBJECT OF THE INDICTMENT

On redirect examination, the Court allowed Crim to testify in detail concerning the forgery and cashing of checks at the request of VALENTINE which

were totally unrelated to the crimes charged. The evidence related to check cashings occurring in 1977, two years prior to the time of the instant offense, and a 1979 trip to San Francisco for the purpose of forging and cashing checks. Counsel for both defendants objected strongly to this questioning of defendant's prior illegal association with VALENTINE. At first, the Court reasoned that VALENTINE's counsel had "opened this up with reference to talking to this lady about her prior convictions." (RT 179) When counsel informed the Court there had been no prior conviction and that he had not inquired into any, the Court responded:

Prior conduct, then.

> And forgery. You asked about it ten times, as a matter of fact, Mr. Vodnoy. (RT 179)

Although the District Court reasoned that defense counsel had somehow opened the door to this type of evidence, the record is devoid of any line of questioning that could reasonably be construed to open the door to allow the government to elicit detailed testimony of other crimes not alleged in the Indictment.

The testimony of Faulkner was likewise tainted by the admission of other crimes evidence. During direct examination the government inquired as to what Faulkner's motive was for testifying against the defendants. The witness testified that her motive was

revenge for having been "set-up" by the defendants previously.

By Mr. Feess: Other than the reasons you have already given for coming to the FBI in September, 1980, do you have any other motive for wanting to testify in this case.

Faulkner: Yes.

Mr. Feess: What is that motive?

Faulkner: Revenge.

Mr. Feess: Why do you say "revenge"?

Faulkner: Because I had to do time before for them. I was set-up twice by them and I am not doing no more time for them. (RT 267)

The admission of this other

crimes evidence forced the defendants into a position of having to do their best to impeach the witness' credibility. Counsel for VALENTINE was forced to cross examine Faulkner and Crim extensively into their prior records and their past criminal associations with the defendant.

The ultimate result of both the direct and cross examination was to focus the attention away from the charged crimes and into unrelated areas of other crimes or bad acts. Cross examination of Faulkner ultimately revealed that she worked for the defendant for close to seven years in a check cashing and forging scheme. Similarly, cross examination of Crim ultimately revealed fifteen to twenty

Other crimes in which VALENTINE was allegedly involved.

Rule 404(b) of the Federal Rules of Evidence governs the admission of evidence of other crimes, wrongs, or bad acts. It prohibits admission of such bad acts to prove the character of a person in order to show that he acted in conformity with that character. Thus, the Federal criminal justice system rejects the notion that because the defendant may have committed prior bad acts he is more likely than not to have committed the charged crime. Federal Protections of the Criminal Defendant---A Re- Evaluation of the Privileges Against Self Incrimination and the Rule Excluding Evidence of Propensity to Commit Crimes, 78 Harvard

Law Review 426, 436 (1964); United States v. Goodwin, 429 F.2d 1141, 1148 (1974).

The alleged prior bad acts of defendant VALENTINE in participating in check forging and cashing, as testified to by Crim and Faulkner, did not relate to any material element of the charged crime and should have accordingly been excluded.

The exceptions to the exclusionary provisions of Rule 404(b) are limited and were not intended to open the door for the admission of prior crimes or bad acts. Thus the rule allows admission only if the government first satisfies the Court that the offered prior similar act is relevant to prove motive, opportunity, intent,

preparation, plan, knowledge, identity or absence of mistake or accident. Once the government has established the purpose for which it is offering prior acts, if the evidence is deemed relevant, the Court must then balance the probity value of the evidence against the possible prejudice suffered by the defendant as a result of its admission. See, Advisory Committee Notes, Federal Rules of Evidence Rule 404(b).

In the instant case, the burden was on the government to prove that the prior check cashings and forgeries were relevant proof of some material issue. The record reveals that no such proffer was made. The Court merely allowed in the other crimes evidence without

requiring the government to show why it was relevant and without making any finding as to its relevancy. The Court made a decision that the evidence was mandatorily admitted. The Court failed to make the proper balancing test under Rule 403 of the Federal Rules of Evidence. The Court's comments at the time of the ruling illustrates the lack of understanding the Court had about the purpose of the admission of the evidence as well as the standard for its admission. When both counsel objected to the first line of inquiry regarding other crimes or bad acts, the following colloquy occurred:

Mr. LICHTMAN: Your honor, I would object to this line of questioning regarding

other co-conspiracies not charged in the indictment pursuant to a recent case.

COURT: The objection is overruled, counsel. You all opened this up with reference to talking to this lady about her prior convictions. I think she is entitled to explain them.

Mr. VODNOY: Your honor, there is no prior conviction that we asked about.

COURT: Prior conduct then and forgery. You asked about it ten times, as a matter of fact, Mr. Vodnoy. [RT

179).

Obviously, the Court was not cognizant of why the evidence was coming in. The Court's initial response was that it was coming in to allow the witness to explain her prior convictions. However, no prior convictions had come into evidence. The Court was obviously not attentive to the witness' testimony and did not make a thoughtful response as to why the other crimes evidence should have been admitted. When the Court was informed that there was no inquiry into her prior convictions, the Court then justified the admission based on defense counsel's inquiry into the woman's other crimes or bad acts. A review of the record reveals that neither defense counsel

opened up this line of inquiry.

Most importantly, the Court made no showing that it had balanced the prejudice of the admitted testimony against its probative value. It is clear from a reading of the colloquy above, that the Court desired the evidence to come in and failed to make any thoughtful analysis as to the underlying reasons for its admission.

In United States v. Green, 648 F.2d 587 (9th Cir. 1981) the Ninth Circuit held:

> [T]he demands of Rules 403 are met if it "appears from the record as a whole that the trial judge adequatedly weighed the probative value and prejudicial effect of proffered evidence". [United States v. Sangrey 586 F.2d at 1315 (9th Cir.

> 1978)]. Where, however, as in this case, the evidence is admitted at trial under a different theory and the record does not disclose that the trial judge performed the necessary weighing under Rule 403, the deference customarily accorded the trial court's ruling is inappropriate. 648 F.2d at 587.

In the instant case, the trial court was not even aware of its own reasons for allowing the evidence in. The Court first made an "off the cuff" guess as to why the evidence should be admissible. When he was corrected in that regard by counsel he again erroneously gave a second reason as to why the evidence should be admissible. Neither reason is supported by the record and in fact is directly contrary to the fashion in which the direct and

Cross-examination was conducted. Similarly, no argument can be made that the Court made any balancing test before admitting the evidence. Thus, the Court did not balance the prejudicial effect of more than two years of continuous criminal conduct associated with the testimony of the witnesses. As a result of the matter being opened up on redirect examination, VALENTINE was forced to cross examine the witnesses extensively. As a result of that cross examination, the testimony revealed that the witnesses had been engaged in prior criminal conduct with VALENTINE for a period in excess of five years. The prejudicial impact of such testimony is clearly devastating even without regard to its relevance. In the instant case,

however, the Court erroneously set forth the relevancy grounds without taking into account in any degree or manner the potential prejudicial effect of the evidence as required by the rule. Under these circumstances, deference cannot be given to the District Court's decision to admit the evidence.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari be granted and the Writ issue.

Respectfully submitted,

JOSEPH T. VODNOY

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. GARY RAE BUCHANAN, Defendant-Appellant.	No. 81-1186 DC# CR-81 109-R
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. YOULESS JAMES VALENTINE, Defendant-Appellant.	No. 81-1187 DC# CR-81 109-R MEMORANDUM

Appeal from the United States District Court for the Central District of California District Judge Manuel L. Real, Presiding

[Argued and Submitted April 9, 1982]

Before: WRIGHT and SNEED, Circuit Judges, and Solomon,* Senior District Judge.

Defendants Buchanan and Valentine developed a forged withdrawal scheme in which a bank employee supplied account information. They were convicted of conspiring to embezzle bank funds and causing false entries to be made in bank records. Their appeal complains of several purported trial errors.

Two government witnesses testified about their previous criminal activity, mucho of which was directed by Buchanan and Valentine. Defendants contend this prior crimes evidence should have been excluded.

The decision whether to admit evidence under Fed. R. Evid. 404(b) is within the discretion of the trial

judge. E.G., United States v. Hooton, 662 F.2d 628, 634 (9th Cir. 1981.) Prior crimes evidence may be admitted to show motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident. Rule 404(b) is inclusionary, excluding evidence of other crimes only when it proves nothing but criminal disposition. United States v. Diggs, 649 F.2d 731, 737 (9th Cir.), cert. denied, 102 S.Ct. 515 (1981).

Defendants' cross-examination of the government witnesses suggested that the scheme was designed and implemented by the witnesses. Testimony about defendants' prior conduct was properly admitted to dispel this exculpatory implication. United States v. Calhoun,

604 F.2d 1216, 1218 (9th Cir. 1979); see United States v. Cook, 538 F.2d 1000, 1004 (3d Cir. 1976).

Moreover, by denying participation in the crime, defendants permitted the government to show they possessed the requisite knowledge and ability to commit the crime. See, e.g., United States v. Green, 648 F.2d 587, 592 (9th Cir. 1981) (word "opportunity" intended to cover all or part of a category called "capacity").

Evidence admissible under Rule 404(b) is subject to the relevancy test of Rule 403. Evidence of a history of forgery and check cashing activity covering at least six years is prejudicial. But it is not so prejudicial that it causes the jury to

focus on the defendants' character instead of on what happened. Cf. Cohn v. Papke, 655 F.2d 191, 193-94 (9th Cir. 1981) (per curiam) (evidence of Cohn's prior sexual experiences and sexual preferences).

Defendants claim the trial judge prevented adequate cross-examination of the government witnesses. They contend they were unable adequately to explore bias and credibility. See, e.g., Burr v. Sullivan, 618 F.2d, 586 (9th Cir. 1980).

The extent of cross-examination is subject to the discretion of the judge. Generally, once cross-examination reveals to the jury information sufficient to apprise the witnesses' possible bias and motives,

confrontation demands are satisfied. Skinner v. Cardwell, 564, F.2d 1381, 1388-89 (9th Cir. 1977), cert, denied, 435 U.S. 1009 (1978); accord, United States v. Hughes, 658 F.2d 317, 321 (5th Cir. 1981), cert. denied, 102 S.Ct. 1280 (1982)

Defendants adequately exercised their Sixth Amendment right to confront adverse witnessess. They conducted extensive cross-examination, exploring the witnesses' criminal history and prior convictions, their failure to reveal relevant information to authorities, their sexual relationships with the defendants, their motives for testifying, their plea agreements, and witness Crim's access to bank records. Defendants' citation to United States v.

ramoto, 638 F.2d 84 (9th Cir. 1980), is unavailing since any limitation of cross-examination did not concern an issue central to the case.

At the close of trial the judge gave a single instruction that cautioned the jury about accomplice, informant, and immunized witness testimony. Defendants assert that three separate instructions were required.

Cautionary instructions need not be separately stated. Each adminishes the jury to view the testimony with the same care. See generally United States v. Morgan, 555 F.2d 238, 242-43 (9th Cir. 1977). Moreover, the judge properly instructed the jury before taking any evidence.

Defendants also challenge the

judge's formulation of the instruction. No single form is required, and the instruction that was given fairly conveyed the caution required. See, e.g., United States v. Kenny, 645 F.2d 1323, 1337 (9th Cir.), cert. denied, 452 U.S. 920 (1981).

Buchanan argues that the judge erroneously refused to permit an in-court identification by his witness of a government witness. The judge's discretion in conducting the trial includes preventing an unduly suggestive identification procedure. See, e.g., United States v. McDonald, 576 F.2d 1350, 1358 (9th Cir.), cert, denied, 439 U.S. 830 (1978).

Defendant Valentine claims he was denied a fair trial by the court's

frequent interruptions, its restrictions on cross-examination, and its deprecating manner toward defense counsel. Although the judge's attitude and remarks may have been indecorous, they did not create the climate of partiality or unfairness necessary to warrant a new trial.

The convictions are affirmed.